

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RICHARD ROE,	:	98-CR-01101(BMC)
	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	Monday, March 5, 2012
JOHN DOE,	:	10:00 a.m.
	:	
Defendant.	:	
	:	

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TRANSCRIPT OF CRIMINAL CAUSE FOR PROCEEDINGS
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Government: LORETTA E. LYNCH, ESQ.
United States Attorney
Eastern District of New York
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BY: EVAN M. NORRIS, ESQ.
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New York, New York 10174
BY: MICHAEL P. BEYS, ESQ.
JASON BERLAND, ESQ.

A P P E A R A N C E S: (Continued)

For Richard Lerner WILSON, ELSER, MOSKOWITZ & DICKER, LLP
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 BY:COLEEN FRIEL MIDDLETON, ESQ.

Also Present: WILSON, ELSER, MOSKOWITZ & DICKER, LLP
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 New York, New York 10017
 BY:RICHARD E. LERNER, ESQ.

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Victoria A. Torres Butler, CRR
Official Court Reporter

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1 (In open court.)

2 (Judge BRIAN M. COGAN enters the courtroom at
3 10:07 a.m.)

4 THE COURTROOM DEPUTY: All rise.

5 THE COURT: Good morning, be seated, please.

6 THE COURTROOM DEPUTY: Roe versus Doe, Docket Number
7 98-CR-1198.

8 Counsel, please state your appearances for the
9 record, starting with Government.

10 MR. NORRIS: For the Government, Evan Norris and
11 Lisa Kramer.

12 THE COURT: Good morning.

13 MR. NORRIS: Good morning, Your Honor.

14 MS. KRAMER: Good morning.

15 MR. BEYS: For John Doe, Michael Beys and Jason
16 Berland.

17 Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. LERNER: I'm Richard Lerner, I'm still Counsel
20 of record for Mr. Roe.

21 For the purpose of the contempt proceedings, if any
22 contempt proceedings are to proceed, he is seeking separate
23 Counsel. And so, we will request an adjournment on his behalf
24 so that he may retain separate Counsel for contempt
25 proceedings.

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1 Coleen Middleton is here as my Counsel, and we have
2 submitted a pro hac vice application for her to appear in my
3 behalf.

4 THE COURT: Okay. So, Mr. Roe is going to get a
5 separate attorney as well; right?

6 MR. LERNER: Yes.

7 THE COURT: Okay.

8 Just give me a timetable on that, Mr. Roe.

9 MR. ROE: Me?

10 THE COURT: Yes, how long do you think?

11 MR. ROE: Two or three weeks. I mean, that's
12 including getting him up to speed.

13 I'm sorry, I know you want me to stand. I have a
14 very bad disability.

15 THE COURT: That's quite all right.

16 Ms. Middleton, let me say this: The reason I called
17 you in here is only, primarily because I've got some
18 scheduling difficulties. I thought we should talk about
19 working out a schedule on the contempt motion because I
20 couldn't do exactly what you'd like me to do.

21 Let me start by granting Ms. Middleton's pro hac
22 vice application.

23 Ms. Middleton, I thought I might see Steve Kent in
24 this case at some point, but I am equally happy to see you.

25 MS. MIDDLETON:

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1 THE COURT: The application is, of course, granted.
2 Pay your \$25.00, please.

3 MS. MIDDLETON: Yes. I have.

4 THE COURT: Okay, thank you.

5 MR. ROE: For the record, I don't mean to interrupt,
6 but I have to withdraw. The statute, whether you recognize it
7 or not, I notice to withdraw the substitution of Mr. Lerner
8 for last week.

9 THE COURT: Okay.

10 All right, that actually raises a couple of
11 questions I just wanted to throw out there, primarily for
12 Ms. Middleton's benefit and then, she can perhaps discuss them
13 with Mr. Roe's attorney when he or she comes in.

14 What occurred to me, Ms. Middleton, is to the extent
15 there is a conflict that requires your presence here, I'm not
16 sure it's solved by your presence here. The reason I say that
17 is that if Mr. Lerner has a conflict in representing Mr. Roe
18 in these proceedings, then that conflict is imputed to the
19 firm. Every lawyer in that firm, it seems to me -- and I'm
20 not ruling on this, I'm just suggesting it's worth
21 considering -- might have that same conflict.

22 So, for example let's assume that ultimately I
23 decide to impose some substantial sanction for contempt and
24 the question becomes which one of them is going to pay it.

25 MS. MIDDLETON: Yes.

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1 THE COURT: You're going to advocate on behalf of
2 Mr. Lerner, presumably, that he should pay not at all or less;
3 and yet, your firm is representing Mr. Roe.

4 MS. MIDDLETON: We are not, Your Honor.

5 THE COURT: Oh.

6 MR. LERNER: Well...

7 (Pause in the proceedings.)
8

9 THE COURT: Well, your firm is not representing
10 Mr. Roe in this proceeding, but it is Counsel for Mr. Roe in
11 everything that's happening before Judge Glasser.

12 MR. ROE: That's -- Your Honor, we submit that going
13 forward, that that will not be the case.

14 THE COURT: Oh. So you're saying that not just for
15 purposes of this contempt motion --

16 MS. MIDDLETON: Right.

17 THE COURT: -- but for all proceedings Mr. Roe is
18 going to have his own lawyer, not Mr. Lerner, in front of
19 Judge Glasser.

20 MS. MIDDLETON: Before Judge Glasser, you're
21 correct, Your Honor.

22 THE COURT: Okay. I thought that's different than
23 what Mr. Lerner just told me, but if that's your position,
24 that's fine.

25 MS. MIDDLETON: That's the position, Your Honor.

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1 THE COURT: Okay. So that should, I believe,
2 eliminate that concern.

3 Obviously, I'll let Mr. Doe and the Government opine
4 later, and I'm not looking to decide anything today, like I
5 said, I'm just trying to identify potential issues, but that
6 would alleviate the one, I think, that occurred to me.

7 MS. MIDDLETON: Yes.

8 And we did consider that before the firm asked me to
9 represent Mr. Lerner.

10 THE COURT: Okay. That's good.

11 All right. And then -- yes?

12 MR. NORRIS: If I could just add, there is a pending
13 application for the Supreme Court, I believe, that the firm
14 has filed, and I don't know if there's a different calculus
15 from Mr. Lerner and Ms. Middleton with respect to representing
16 Roe in that proceeding.

17 I just wanted to bring that to the Court's
18 attention.

19 MR. LERNER: I think it would be abandonment of the
20 client if I were to leave them in the lurch now. We have a
21 petition with the U.S. Supreme Court and I cannot abandon my
22 client when we have a petition for a writ of certiorari.

23 THE COURT: Like I said, I'm not determining
24 anything today. So, you might have reasons why you want to
25 stay involved. It seems to me that if Mr. Roe had the new

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1 Counsel who's going to represent him in this Court substitute
2 in on the certiorari petition, that would alleviate that
3 problem as well and you wouldn't be abandoning him if you had
4 a conflict and that's what he wanted to do.

5 MS. MIDDLETON: Your Honor, we have asked for an
6 extension of time with regard to the petition to the Supreme
7 Court and, as of now, the determination has not been made that
8 the firm will continue to represent Mr. Roe.

9 THE COURT: So that's an open issue you are thinking
10 about.

11 MS. MIDDLETON: Yes, Your Honor.

12 MR. ROE: If I may, I didn't want to mislead the
13 Court. I didn't mislead the Court.

14 THE COURT: Mr. Roe, I thought you had a disability
15 where you couldn't stand up.

16 MR. ROE: It's actually the sitting down part.

17 THE COURT: Okay.

18 MR. ROE: I have a -- I'd be happy to show you the
19 scar.

20 THE COURT: You don't need to show me the scar, I
21 just want you to be comfortable. You can stand up or sit
22 down, whichever is easiest for you.

23 MR. ROE: The, I was informed of Mr. Lerner's use
24 of --

25 I'm sorry, your last name.

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1 MS. MIDDLETON: Ms. Middleton.

2 MR. ROE: -- Ms. Middleton either last Thursday
3 afternoon or early Friday and Mr. Lerner told me, and I'm not
4 blaming him for any confusion, he told me that it was just for
5 the contempt proceeding.

6 Now, the size and enormity of the stuff before
7 Judge Glasser and the Supreme Court is certainly, in
8 complexity and history, far beyond a contempt proceeding that
9 really, essentially, process hasn't attached yet. So, I will
10 do my honest best to get another attorney to get in here in
11 two or three weeks, except that it's now being told that I'm
12 going to need to get him up to speed on everything else.

13 Because those hearings in front of Judge -- in other
14 words, what I'm saying is, in good faith, two or three weeks,
15 but if it takes longer, I respectfully ask that if we fax such
16 a request, that nobody's playing games to substitute an
17 attorney for everything, particularly for a cert petition and
18 get all of that substitution done so the contempt can proceed
19 as quickly. It may not be a two- or three-week matter. And I
20 didn't mean to mislead you, this is the first I heard that
21 they're requesting to withdraw, so...

22 THE COURT: Well, do the best you can in terms of
23 getting a new attorney in for whatever scope of the matters
24 that Mr. Lerner is not going to represent you on anymore.

25 Yes, Ms. Middleton.

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1 MS. MIDDLETON: Your Honor, I just wanted to note
2 that the reason we have not made the determination and
3 substitution of Counsel is still pending for Mr. Roe is that
4 the petition is intertwined and relates to the underlying
5 proceedings.

6 THE COURT: Yes, I understand. I mean, I see the
7 difficulty.

8 All right. And the only other thing I wanted to ask
9 of you, Ms. Middleton, is that I wanted you -- as I'm sure you
10 will anyway, but I thought I would just ask you expressly --
11 take a close look at the papers that have been submitted to me
12 and to Judge Glasser.

13 MS. MIDDLETON: Yes.

14 THE COURT: I'm sure you will give Mr. Lerner
15 appropriate advice about the nature of those kinds of filings
16 to the Court.

17 MS. MIDDLETON: Yes, Your Honor. I have carefully
18 reviewed the relevant documents.

19 THE COURT: Okay.

20 MS. MIDDLETON: I'm prepared today to address
21 whatever issues the Court and the other parties would like to
22 discuss.

23 THE COURT: Okay. Well, this is just a scheduling
24 and issue identification hearing, not a resolution hearing
25 because you haven't had time to get up to speed and Mr. Roe

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1 doesn't have a lawyer yet.

2 And then my last question is, I had suggested last
3 week that this motion that Mr. Doe has brought could, and
4 probably should, more properly be heard as a criminal
5 contempt, not a civil contempt, although I'm treating this one
6 as a civil contempt. And I suggested, I had actually referred
7 it to the Government for consideration.

8 I have not heard from the Government whether it is
9 still considering that or, since it hasn't filed anything, has
10 reached a determination that it is not going to pursue
11 criminal contempt.

12 MR. NORRIS: Your Honor, the Government is still
13 internally discussing what to do about the referral. It has
14 not yet made a decision with respect to the proper
15 disposition.

16 THE COURT: Okay. Well, hopefully, you'll do that
17 by the time Mr. Roe gets a lawyer involved and I'll try to
18 schedule that.

19 I will tell you, frankly, if there is going to be a
20 criminal proceeding, then I'm not sure I would proceed with a
21 hearing on the civil proceeding because the criminal
22 proceeding might well be determinative of the civil
23 proceeding. It might not, but it might. I'd at least like to
24 know how many pieces there are before I start deciding how to
25 structure them. So, whenever the Government can reach this

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1 conclusion, let me know.

2 And then, of course, there is the possibility that
3 if the Government declines, I may appoint someone as well.
4 But I want to take things in order.

5 My scheduling difficulty is that I start a lengthy
6 trial next week. I do try that case, however, only Mondays
7 through Thursdays and I generally stop at 4:30. I'm going to
8 have to give you a 4:30 to avoid this getting out too long.
9 And if we get started and we have to continue on a different
10 date, then we will. Let's say April 9th, at 4:30.

11 MS. KRAMER: Your Honor, could we possibly do a
12 different date? I'm sorry, I'm out of town that day. Any day
13 the following week is fine.

14 THE COURT: The following week.

15 MS. KRAMER: If that's possible. I'm sorry, Judge.

16 THE COURT: It's just that we're five weeks out and
17 I don't want to expose these defendants to contempt hanging
18 over their heads any longer than I need to.

19 On the other hand, something may happen with the
20 criminal where that becomes unavoidable anyway.

21 All right. Let's say April 16th at 4:30.

22 MS. KRAMER: Thank you, Judge.

23 THE COURT: Does that work for everybody there?

24 MR. ROE: May I -- I'm sorry.

25 MS. MIDDLETON: It does, Your Honor.

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1 THE COURT: All right.

2 MS. MIDDLETON: I would just seek clarification as
3 to what the Court envisions the next proceeding to cover and
4 what it will consist of.

5 THE COURT: Well, right now the only thing that's on
6 is the motion for civil contempt. That may change depending
7 on what the Government and then I decide to do and obviously,
8 you'll have notice of that. If it becomes criminal and that
9 requires an adjournment, I'm obviously not going to force
10 anybody to a quick criminal trial.

11 Whether the 4:30 hearing on the civil contempt
12 brought by Mr. Doe will be evidentiary or not, I don't know
13 what the proponent has in mind. Did you intend to call the
14 alleged contemnors as witnesses?

15 MR. BEYS: At least one of them, yes, Your Honor.

16 THE COURT: Can you tell us which one, since it's
17 civil?

18 MR. BEYS: Mr. Roe.

19 THE COURT: All right.

20 MS. MIDDLETON: And Your Honor.

21 THE COURT: Yes.

22 MS. MIDDLETON: If there's an evidentiary hearing,
23 we'd also like to issue subpoenas and we ask that the case
24 file be unsealed for the purposes of serving meaningful
25 subpoenas and being able to elicit, meaningful testimony.

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1 THE COURT: Why don't do you this: Submit the
2 subpoenas that you want to issue to me.

3 MS. MIDDLETON: Okay.

4 THE COURT: With copies to your adversaries.

5 MS. MIDDLETON: Okay.

6 THE COURT: And then, I'll give the adversaries
7 72 hours to object to them, and then I'll rule on whether I'm
8 going allow their issuance.

9 MS. MIDDLETON: Thank you.

10 THE COURT: All right.

11 MR. ROE: And may I, Your Honor, since given -- if
12 you give me the liberty, I understand it's unusual that I
13 would speak.

14 Their motion technically comes under Rule 83.6.
15 There are a couple of housekeeping rules.

16 THE COURT: I'm waiving the local rule.

17 MR. ROE: Well, I'm not asking you to enforce it.
18 I'm asking whether the Court can note that we're -- at least I
19 am -- putting at issue, therefore triggering the procedural
20 rights, the evidentiary -- I guess it's precluded, the point,
21 since we're evidentiary an hearing.

22 THE COURT: Right.

23 MR. ROE: I just want to not get lost in the
24 paperwork that we made a special appearance and technically
25 didn't address the merits.

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1 So, is there an objection to filing a merits
2 response?

3 THE COURT: No, go ahead and file a merits response
4 in the usual fashion for this case.

5 MR. ROE: And if I may, Your Honor, one other
6 question procedurally for my clarification so I know what kind
7 he have lawyer to get. If you'll forgive me, I'm confused.

8 Is it the Court's position that the referral to the
9 U.S. Attorney's Office comes under Federal criminal Rule 42?

10 THE COURT: Yes.

11 MR. ROE: With respect, that requires, I think,
12 before you make the referral, that there be some definite
13 statement.

14 I understand Your Honor said that undermining court
15 orders is not, per se, a violation that you believe can be a
16 cause of action in criminal contempt. I merely, just for the
17 record, note that since there was no trial date given, no
18 pre-motion date, no determination, that there is no ticking
19 clock on my Rule 12(b) motions that might be made on the
20 criminal side.

21 THE COURT: That's absolutely correct, there is no
22 criminal proceeding pending.

23 MR. ROE: I just wanted to -- thank you.

24 THE COURT: Okay.

25 Is there anything else?

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1 MS. MIDDLETON: Your Honor, if we wish to move to
2 dismiss, we'd like a date to do so.

3 THE COURT: Move to dismiss what?

4 MS. MIDDLETON: The contempt proceeding entirely.

5 THE COURT: Well, I don't think you would move to
6 dismiss a contempt proceeding. You would have your opposition
7 to the contempt proceeding, which might include either
8 jurisdictional or merits grounds.

9 MS. MIDDLETON: Right.

10 So, it could be a response, only to the motion
11 filed.

12 THE COURT: It would be a response to the motion,
13 correct.

14 MS. MIDDLETON: Okay.

15 THE COURT: And when would you like to do that?

16 MS. MIDDLETON: One week from today, Your Honor.

17 THE COURT: That's fine.

18 MR. ROE: That's what I meant by merits responses,
19 what she just asked for. I'll join in the date, then.

20 THE COURT: That's fine.

21 MS. MIDDLETON: All right.

22 MR. BEYS: Judge, I would just note for
23 Ms. Middleton's benefit, there has already been one motion to
24 dismiss civil contempt proceedings for lack of jurisdiction
25 and Your Honor found last Monday that Your Honor has

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1 jurisdiction.

2 THE COURT: Yes, I don't think it is a
3 jurisdictional issue, that's why I denied that motion.

4 Okay, anything else?

5 MR. BEYS: Only, Your Honor, a housekeeping matter.

6 There was a reference to a filing to the
7 United States Supreme Court. I handed up my only copy just so
8 Your Honor would have it for purposes of today.

9 If could have it become.

10 THE COURT: I haven't had a chance to look at it and
11 I don't think I need it today.

12 MR. BEYS: Okay.

13 THE COURT: So, I'll give it back to you now.

14 MR. BEYS: Thank you.

15 MS. MIDDLETON: Your Honor, we can make copies for
16 the Court.

17 THE COURT: Do I need it?

18 Let me ask Mr. Beys: Is it your contention that the
19 filing of that petition was part of the contempt?

20 MR. BEYS: No, not as of right now.

21 THE COURT: So, I don't think I need to see it.

22 MS. MIDDLETON: I don't think that's before the
23 Court, Your Honor.

24 THE COURT: Okay.

25 MS. MIDDLETON: One housekeeping as well.

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1 We continue to request that a separate Docket Number
2 be issued here. Currently, as you know, it is -- the contempt
3 proceedings are being conducted under the 98-CR-1101 caption
4 and Case Number.

5 THE COURT: No, I know your motion. I haven't done
6 that yet. I haven't ruled on that yet.

7 Let me hear from the Government and from Doe as to
8 what their position is as to whether the civil contempt should
9 be opened as a separate matter.

10 MR. NORRIS: Your Honor, can I just have one moment
11 to confer?

12 THE COURT: Sure.

13 (Pause in the proceedings.)
14

15 MR. ROE: If I may, while they're conferring.

16 We received a, quote, letter addendum, unquote, to
17 the initial motion last week. I'm assuming that you'll grant
18 the request from Mr. Beys that they be allowed to amend the
19 motion.

20 But just for absolute clarity, is that deemed now
21 part of the petition so I know when we're objecting? He's got
22 eleven new counts of civil contempt in the letter and since it
23 doesn't look anything like -- I just want to know whether
24 those are in the case or not.

25 He wrote a letter to Your Honor saying here's a

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1 letter, reasons to hold him in contempt. Is that going to be
2 deemed formally a part of the motion? I mean, I need to know
3 to know how to object.

4 THE COURT: Yes.

5 MR. ROE: Okay.

6 THE COURT: Okay, anything else?

7 MR. NORRIS: With respect to the question Your Honor
8 just raised.

9 THE COURT: Yes.

10 MR. NORRIS: I think given that given that our civil
11 contempt arises out of the criminal case, our view is that the
12 98-CR-1101 docket is sufficient and should be maintained for
13 these proceedings, especially in light of the actions that
14 have given rise to the civil contempt.

15 THE COURT: Ms. Middleton, what does anybody gain by
16 opening yet another Docket Number, other than the district
17 statistics improve by an additional filing?

18 MS. MIDDLETON: Well, Your Honor, first it is a
19 civil matter. It is called Doe v. Roe. And so, that
20 indicates a civil matter not a criminal caption.

21 In addition, these are open proceedings, unlike the
22 98-CR-1101, which is filed under seal.

23 THE COURT: I see. So, you want the separate
24 proceeding established because it's your assumption that
25 everything that happens in it will be public?

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1 MS. MIDDLETON: Well, my understanding, Your Honor,
2 for example, the hearing on Monday of last week and the
3 transcript that resulted were not sealed. And so, everything
4 in the case file for 98-CR-1101 is sealed.

5 MR. ROE: If I may add to her remarks.

6 On the issue of criminal contempt, I'm virtually
7 certain that the Supreme Court in the case of -- I know we're
8 not there yet.

9 THE COURT: We're not there. Don't talk to me about
10 criminal contempt. We have no criminal contempt in front of
11 us.

12 MR. ROE: All right.

13 On the issue of civil contempt we are requesting
14 that the docket be made separate simply because first, in
15 In Re: Rosado, I believe cite mid-86, give or take a year,
16 the Second Circuit ruled that even in civil contempt
17 proceedings Sixth Amendment rights attach, and a
18 Sixth Amendment right would be meaningless if the public can't
19 find anything that's going on.

20 THE COURT: Okay, well, that's wrong. That's just
21 wrong. The Sixth Amendment right has to do with your right to
22 representation; more specifically, setting a schedule here so
23 you can get representation.

24 There may be other rights that are at issue, but the
25 Sixth Amendment right is going to be fully protected.

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1 Yes, Mr. Beys?

2 MR. BEYS: Judge, on behalf of John Doe, we take no
3 position on whether or not to have a separate Docket Number.

4 But it seems to me that it would defeat the whole
5 purpose of the Second Circuit's injunctions to have an open
6 case, an unsealed case, for these contempt proceedings.

7 THE COURT: Well, we might open a case called
8 Roe v. Doe, and then we might selectively seal anything filed
9 in that case that would run foul of Judge Glasser's
10 injunctions or the Second Circuit's injunctions.

11 We might do that. I want to think about that some
12 more.

13 MR. BEYS: Very well, thank you.

14 MR. ROE: And frankly, I concur.

15 But the only point I think to make -- and I don't
16 think I'll have anything after this, honestly -- is that you
17 are presiding over a contempt motion predicated on an alleged
18 violation of an order of the Second Circuit and without regard
19 to revisiting the issue of primary subject matter
20 jurisdiction, which you've already ruled on, we're not charged
21 with violating any order of Judge Glasser. We're charged with
22 violating an order of the Second Circuit.

23 It seems to offend the concept of accurate docketing
24 that we're docketed in a case where that may be how we got on
25 appeal, but nobody's accusing us of violating a order of Judge

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1 Glasser in this proceeding.

2 THE COURT: I have your point. I'll take it under
3 advisement.

4 MR. ROE: Thank you.

5 MS. MIDDLETON: Your Honor, I would also point out
6 that proceedings are, by default, supposed to be open to the
7 public.

8 THE COURT: Absolutely.

9 MS. MIDDLETON: And especially contempt proceedings,
10 per the case law, are supposed to be open.

11 THE COURT: Right. I recognize that there is a
12 balancing test and the initial starting point is openness.

13 MS. MIDDLETON: Yes.

14 THE COURT: And there's got to be -- I don't think
15 the cases use this phrase, but I think it's fair to say -- a
16 darn good reason for having them open.

17 MS. MIDDLETON: Yes.

18 THE COURT: I understand is that.

19 MS. MIDDLETON: So, that's another reason we seek a
20 separate docket.

21 THE COURT: Okay. But it's not going to be much
22 different. We're going to look at each thing that is filed
23 and said, if we did open a different docket, and say: Does
24 the public disclosure of this information undermine the
25 Second Circuit or Judge Glasser's injunctions?

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1 And if it does, then that's probably going to be
2 good cause for sealing until Judge Glasser and the
3 Second Circuit sealing orders are vacated.

4 MR. ROE: We understand that, but that's what is
5 currently required and that's something that's been absent
6 from any process to date, with all respect. I'm not aware
7 that anybody's every individually examined anything.

8 THE COURT: There may be things that you're not
9 aware of and that, nevertheless, The Circuit is aware of.

10 All right, thank you very much. I will see you all
11 in a few weeks.

12 ALL: Thank you, Judge.

13
14 (WHEREUPON, the proceedings were adjourned to
15 April 16th, 2012, at 4:30 p.m.)

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